SUPREME COURT, U. S.

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Supreme Court of the United States

OCTOBER TERM, 1968

No. 318

VANCE TRUCKING COMPANY, INC., AND ALLSTATE INSURANCE COMPANY, PETITIONERS,

versus

CANAL INSURANCE COMPANY, FORRESTER TRUCKING COMPANY, INC., HERBERT FRANCIS CARSON, SCOTT CARSON, SUSAN CARSON, DAVID CARSON, CHRISTOPHER CARSON, AND ROBERT H. CARSON, ADMINISTRATOR OF THE ESTATE OF ANNIE BARBARA CARSON, DECEASED, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners, Vance Trucking Company, Inc. and Allstate Insurance Company, pray that a writ of certiorari issue to review the decision of the Court of Appeals for the Fourth Circuit entered May 7, 1968.

OPINIONS BELOW

The order of the District Court dated January 6, 1966, is reported at 249 F. Supp. 33 and is printed in the Appendix at page 13. The order of the District Court dated

March 9, 1966, is reported at 251 F. Supp. 93 and is printed in the Appendix at pages 36, 37. The opinion of the Court of Appeals, No. 10,669, 4 Cir., May 7, 1968, is printed in the Appendix at page 34. The order of the Court of Appeals denying rehearing, dated June 20, 1968, is printed in the Appendix at page 42.

JURISDICTION

The decision sought to be reviewed was filed May 7, 1968. The jurisdiction of this Court to review this decision by writ of certiorari is conferred by 28 U. S. C., § 1254 (1) (1958).

QUESTION PRESENTED

Is the decision of the Court of Appeals requiring proration of insurance in the absence of co-insurance of the same risk in conflict with the applicable law of the State of South Carolina?

A subsidiary question comprised herein is:

Does the decision of the Court of Appeals impair obligations of contract in violation of Article 1, § 8 of the Constitution of South Carolina?

CONSTITUTIONAL PROVISION INVOLVED

(Code of Laws of South Carolina, 1962, Vol. 16, p. 21), Article 1, § 8, Constitution of South Carolina.

> "§ 8. Attainder; *ex post facto* law; impairment of contracts; titles; effect of conviction.—No bill of attainder, *ex post facto* law, law impairing the obligation of contracts, nor law granting any title of nobility or hereditary emolument, shall be passed, and no conviction shall work corruption of blood or forfeiture of estate."

STATEMENT OF CASE

This declaratory judgment action was instituted on June 19, 1963, in the United States District Court for the District of South Carolina, under 28 U. S. C., §§ 2201 and 2202, jurisdiction being based upon 28 U. S. C., § 1332 (a) (1). The complaint sought a determination of the rights and obligations of two trucking companies and their insurers with regard to claims for wrongful death and bodily injuries resulting from an accident that occurred on October 4, 1962.

The case was tried in the non-jury term of District Court on December 8 and 9, 1965, and by order dated January 6, 1966, the District Court held that the operator of the tractor-trailer involved in the accident was the agent of both Vance Trucking Company and Forrester Trucking Company. On March 9, 1966, the District Court issued its further order holding that the operator of the tractor-trailer was not insured by either insurance company; that Allstate Insurance Company insured Vance Trucking Company only; that Canal Insurance Company insured Forrester Trucking Company only; and that as the Allstate limit of coverage as to each person was $500,000.00 and the Canal limit as to each person was $100,000.00 Allstate must bear pecuniary responsibility of five-sixths and Canal Insurance Company one-sixth of the amount of any judgment suffered. (Curiously, although multiple claims are involved the District Court disregarded the aggregate limits of the policies, $500,000.00 on the part of Allstate and $300,000.00 on the part of Canal, when assessing the proportionate responsibility.)

Although on almost the same day that the District Court issued its latter order the South Carolina Supreme Court rendered a decision in *Galloway v. Southern Farm Bureau Insurance Co.*, 247 S. C. 288 (1966), in which the

South Carolina Court said that co-insurance of the same risk is prerequisite to the right of contribution among insurers, the Court of Appeals for the Fourth Circuit affirmed the order of the District Court. And although subsequent to the oral arguments in the Court of Appeals and prior to the decision of that court the South Carolina Supreme Court rendered a decision in *Travelers Insurance Co. v. Allstate Insurance Co.*, 155 S. E. 591 (S. C. 1967), holding that a liability insurance carrier only contracts to pay any debt the insured is liable to pay, the Court of Appeals denied appellants' petition for rehearing.

Thereafter the Court of Appeals granted petitioners' motion for stay of mandate, provided that petition for writ of certiorari was filed within 30 days from June 20, 1968.

ARGUMENT

Although the applicability of the principles enunciated in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64 (1938), has been by later decisions restricted [1], we are here dealing with the construction of insurance contracts performable in South Carolina and the substantive law of that state would clearly apply.

Petitioners are no longer contesting the judicial determination that the tractor-trailer driver was insured by neither Allstate nor Canal and was the common agent of both Vance Trucking Company and Forrester Trucking Company; and that Allstate insured Vance only and Canal insured Forrester only. As the District Court said in this connection [2]:

> "The applicable endorsements effectively negate duplicated coverage. Neither trucking company can claim coverage under any policy other than that in

[1] See 17 S. C. Law Quarterly (1965), pp. 467-505, *Erie v. Tompkins Revisited.*

[2] 251 F. Supp. at 98; Appendix p. 38.

which it is the named insured. We have two separate lines of coverage which, in this instance, happen to reach a single act. There is a duality of coverage without a duplication. Each trucking company is concurrently liable and each must look to its own insurer."

Petitioners contend that the applicable law of South Carolina was enunciated by the Supreme Court of that state in *Galloway v. Southern Farm Bureau Insurance Co.*, 247 S. C. 288 (1966), and *Travelers Insurance Co. v. Allstate Insurance Co.*, 155 S. E. 591 (S. C. 1967); however, in the decision of the Court of Appeals the pertinent language of the *Galloway case* was discarded as *dicta*, and in denying the petition for rehearing the *Travelers case* was apparently, in effect, ignored.

In *Galloway v. Southern Farm Bureau, supra*, the South Carolina Supreme Court expressly said that co-insurance of the same risk is a prerequisite to the right of contribution among insurers. In that case Galloway, who was injured when the automobile in which he was riding as a guest and which was a family purpose automobile owned by Tolson with whose permission it was being operated by Wilkes, overturned; and Galloway obtained a judgment against Wilkes in the amount of $100,000.00. Toward the judgment Tolson's insurer paid its limit of $10,000.00 and Southern Farm Bureau, which provided omnibus coverage to Wilkes, likewise paid its limit of $10,000.00. Wilkes was also covered under the omnibus clause of a second policy issued by Southern Farm Bureau, however, and Southern Farm Bureau contended that since Wilkes had other insurance under the first policy its liability was discharged by the payment made thereunder.

The trial judge held, and the Supreme Court affirmed, that as the judgment exceeded the coverage of all three policies Southern Farm's liability had not been discharged

by the single payment. Particularly apposite to the case at bar the court said [8]:

> "Appellant may not, and indeed does not, invoke the *pro-rata* provision of the 'other insurance' clauses with respect to Tolson's policy, because that policy was the primary coverage and liability thereunder was not on a parity with liability under appellant's policy, which was excess insurance, was not identical in scope with the former, and did not come into operation until the former had been exhausted. *Coinsurance of the same risk is prerequisite to the right of contribution among insurers. Laurens Federal Savings and Loan Ass'n v. Home Insurance Co. of New York,* 242 S. C. 226, 227, 130 S. E. (2d) 558; 29 A Am. Jr., Insurance, Sections 1715, 1717. Its contention that the court erred in not applying the pro-rata clauses with respect to its two policies (S 942964 and S 907980) issued to C. A. Wilkes is obviously devoid of merit because, although all other valid and collectible insurance (the Tolson policy and appellant's policy No. S 942964) has been paid and applied on the judgment for respondent's injuries, there remains unpaid of that judgment an amount greater than the coverage under Policy S 907980 upon which this action was brought." (Emphasis added.)

Even if the language of the South Carolina Supreme Court were *dicta* and even if the position which petitioners assert were not implicit from an overall reading of the decision in the *Galloway case,* there cannot, we submit, be any doubt but that the decision of the court below is directly in conflict with the decision of the South Carolina Supreme Court in *Travelers Insurance Co. v. Allstate Insurance Co., supra.* In that case the plaintiff had obtained a verdict in the amount of $25,000.00 jointly against several defendants, two of whom were insured by Travelers and one by Allstate. Counsel for the plaintiff then enforced collection of

[8] 247 S. C. at 292.

the entire judgment against Travelers, and the latter instituted action against Allstate to require contribution in an amount equal to one-half of the judgment. The lower court sustained a demurrer to the complaint, and in affirming the Supreme Court said[4]:

> "Throughout this case each insurance carrier is in the same legal position as its insured. A liability insurance carrier only contracts to pay any debt the insured is liable to pay. * * *. The obligation of the insurance carrier is established by contract and cannot be changed by this court[5] or even by the General Assembly since Article 1, Section 8, of the South Carolina Constitution forbids the Legislature to enact any law impairing the obligation of contracts.
>
> "The Legislature could by statute change the substantive law of this State as relates to the obligations of joint tort feasors and could provide for contribution; and this court might accomplish the same purpose by overruling its previous decisions. But the obligation of insurance carriers as established by contract may not be changed without first altering the rights and obligations of the parties they insure. * * *. Bessinger cannot be made to pay under the substantive law of this State and Allstate has never contracted to protect anyone else. Any other ruling would, in effect, make a new contract for the parties."

Thus, applying the law of South Carolina as enunciated by its Supreme Court, Vance Trucking Co., thus Allstate, may be required to pay all of any judgment rendered against Vance, regardless of the fact that the judgment may also be jointly against Forrester Trucking Company,

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[4] 155 S. E. (2d) at 593.

[5] It is to be noted that unlike the Federal rule as set forth in Tidal Oil Co. v. Flanagan, 263 U. S. 444 (1924), the South Carolina Supreme Court imposes upon itself the same prohibition against the impairment of the obligation of contracts as is imposed upon the General Assembly by Article 1, § 8 of the South Carolina Constitution. It would appear from Erie Railroad Co. v. Tompkins, 304 U. S. 64 (1938) that federal courts passing upon questions of state law would be subject to the same restriction.

or any portion thereof that the plaintiff may choose to enforce against Vance, thus Allstate. By the same token, Forrester, thus Canal, may be required to pay all of any judgment rendered against Forrester, regardless of the fact that the judgment may also be jointly against Vance, or any portion thereof that the plaintiff may choose to enforce against Forrester, thus Canal.

Furthermore, as was held in *Johnson v. Atlantic Coast Line Railroad Co. et al.*, 142 S. C. 112 (1927), although actual damages may not be apportioned between master and servant when liability is predicated solely upon *respondeat superior*, punitive damages may be apportioned in such case. It would follow in our present situation wherein the liability of Vance Trucking Co. and Forrester Trucking Co. results from the acts of their common agent, Burgess, any judgment for actual damages against Vance and Forrester must be joint or in like amounts as to each. However, the jury could render separate verdicts of like amounts for actual damages against the two defendants, and if the jury awarded punitive damages such awards would likely be several and in different amounts depending upon the relative wealth of the defendants.*

Summarizing, if neither Vance nor Forrester were insured a joint verdict against them could be enforced in whole or in part against either of them at the will of the plaintiff. If the verdict for actual damages were awarded severally or if a verdict for punitive damages were apportioned the judgment could be enforced against Vance and Forrester, respectively, only in the amounts prescribed

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* The only tort claim that has been reduced to judgment as of this date is the Wrongful Death action which resulted in a judgment against the two trucking companies jointly in the sum of $85,000.00, actual damages (Appendix, p. 43). However, the holding of Travelers Insurance Company v. Allstate Insurance, 155 S. E. (2d) 591 (S. C. 1967) would still apply, and the remaining five claims for damages resulting from bodily injury may yet result in separate or apportioned verdicts.

by the jury. The Court of Appeals has held that Allstate provides no coverage to Burgess, the common agent, or to Forrester. Allstate insured Vance only. And as the South Carolina court said, "[E]ach insurance carrier is in the same legal position as its insured." Accordingly, to require Allstate to pay any more or any less toward any judgment than could be required of Vance itself would constitute an impairment of the obligations of its contract, in violation of the Constitution and law of the State of South Carolina.

Anticipating opposition to this petition along the tenor that this is an isolated case which merely involves the property rights of the private parties to this suit petitioners, particularly Allstate, submit that problems concerning proration of coverage between multiple insurers are among those most pressing to the industry, and the Court is respectfully requested to take jurisdictional notice of the great abundance of litigation in this regard. Thus, far more important than the immediate pecuniary result to the parties hereto is the fact that a precedent will have been established which will be controlling at least in the Federal Courts of the District of South Carolina and which is patently inconsistent with the precedent established by the South Carolina Supreme Court in *Travelers,* controlling in the State Courts of that State. Indeed, it is reasonable to anticipate that if this conflict of authority is allowed to remain insurance companies would be prudent when similar situations arise to choose between the State and Federal Court on the basis of which decision is more favorable in the particular instance, then will often have to race to trial in effort to obtain a judgment before a judgment may be obtained in an action instituted by its opponent in the other court, in instances when jurisdictional prerequisites are such that the same action may be maintained simultaneously in the State and Federal Courts.

Furthermore, we are here not only dealing with a court of appeals decision in conflict with state law, but with a decision affirming a judgment of the United States District Court for the District of South Carolina which violates the Constitution of that state; and petitioners earnestly contend that the sanctioning of such a judgment by the lower court calls for an exercise of this Court's power of supervision.

CONCLUSION

The decision of the court below decides an important question of substantive law in a way that is in conflict with the applicable law of the State of South Carolina; and the decision of the court below sanctions a judgment of the District Court which impairs the obligations of contract, in violation of Article 1, § 8 of the Constitution of South Carolina as that provision is construed by the Supreme Court of that state. Petitioners, therefore, submit that a writ of certiorari to the Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

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